

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
WISN Hearst-Argyle Television, Inc.	)	
	)	CSR-7764-N
Petition For Waiver of Sections 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 22, 2011**

**Released: March 23, 2011**

By the Senior Deputy Chief, Policy Division Media Bureau:

**I. INTRODUCTION**

1. WISN Hearst-Argyle Television, Inc., licensee of station WISN-TV (ABC), Milwaukee, Wisconsin ("WISN-TV"), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication and syndicated exclusivity rules ("exclusivity rules").<sup>1</sup> Specifically, WISN-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against station WLS-TV (ABC), Chicago, Illinois ("WLS-TV"), in the community of Racine, Wisconsin, which is served by Time Warner Cable.<sup>2</sup> An opposition to this petition was filed on behalf of WLS Television, Inc., licensee of WLS-TV, to which WISN-TV replied. For the reasons discussed below, we deny WISN-TV's waiver request.

**II. BACKGROUND**

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.<sup>3</sup> Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WISN-TV's petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity) would also appertain to a waiver for carriage on DBS systems based on the same showing that a station is no longer significantly viewed in the relevant community. *See* 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k). *See* 47 U.S.C. §§ 340(a)(2) and 340(c).

<sup>2</sup>Petition at 1. WISN-TV states that, according to Commission records, Racine is served by Time Warner Entertainment Company LP and Time Warner Cable of Southwestern Wisconsin, both at the same address in Milwaukee, Wisconsin. *See id.* at n.2.

<sup>3</sup>*See* 47 C.F.R. §76.92; 47 C.F.R. §76.101.

to deletion is exempt from application of the network nonduplication rules if it is “significantly viewed” in a relevant community (the “significantly viewed exception”).<sup>4</sup> The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station receives a “significant” level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.<sup>5</sup>

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*<sup>6</sup> that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b). Section 76.5(i) of the Commission’s rules requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>7</sup> For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission’s rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.<sup>8</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>9</sup>

4. Since the Commission’s decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing “may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September.”<sup>10</sup> Over time, The Nielsen Company (“Nielsen”) became the primary surveying organization through which a petitioner could obtain television surveys. Nielsen, which routinely surveys television markets to obtain television stations’ viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July and November “sweep periods”). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.<sup>11</sup> Accordingly, a petitioner may submit the results from two sweep

<sup>4</sup> 47 C.F.R. §76.92(f); *see* 47 C.F.R. §§76.5(i) and 76.54.

<sup>5</sup> 47 C.F.R. §76.106(a).

<sup>6</sup> 103 FCC 2d 407 (1986).

<sup>7</sup> 47 C.F.R. §76.5(i).

<sup>8</sup> *Id.*

<sup>9</sup> *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>10</sup> 47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year’s survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

<sup>11</sup> Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. *See WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it

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periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.<sup>12</sup> If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percentage of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.<sup>13</sup> In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the data that it collects from over-the-air households for its routine audience sweep periods, selecting in-tab diaries from its database from the area served by a cable system or an individual cable community.<sup>14</sup> It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data, pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.<sup>15</sup> Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (e.g., a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.<sup>16</sup> Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.<sup>17</sup> A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the

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would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

<sup>12</sup>It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

<sup>13</sup>47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

<sup>14</sup>We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was provided by Nielsen. See e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

<sup>15</sup>47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

<sup>16</sup>*Id.*

<sup>17</sup>Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level."

year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

### III. DISCUSSION

5. WISN-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against station WLS-TV for the community of Racine, Wisconsin.<sup>18</sup> WLS-TV is considered to be significantly viewed in Racine County, Wisconsin, where the subject community is located.<sup>19</sup>

6. WISN-TV states that it is an affiliate of the ABC Network and is licensed to a community in the Milwaukee, Wisconsin designated market area (“DMA”), while WLS-TV, also an ABC Network affiliate, is licensed to a community in the Chicago, Illinois DMA.<sup>20</sup> WISN-TV argues that it would normally be entitled to assert exclusivity protection against WLS-TV in the community of Racine in the Milwaukee DMA, but it cannot because WLS-TV is considered significantly viewed in Racine County, Wisconsin, where the community of Racine is located.<sup>21</sup> WISN-TV maintains, however, that WLS-TV no longer meets the significantly viewed standard in Racine and, as proof, it submits the results of special community-specific surveys conducted by The Nielsen Company.<sup>22</sup> WISN-TV states that Nielsen prepared a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes identified for the community.<sup>23</sup> The submitted data are averages of three four-week audience sweep periods in each of two years. The first year’s survey audience estimates were derived from November 2005, February 2006 and May 2006 audience sweep data, combined, and the second year’s estimates from the November 2006, February 2007 and May 2007 audience sweep data, combined.<sup>24</sup> These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules.<sup>25</sup> WISN-TV states that for WLS-TV, the share of total viewing hours in over-the-air homes in Racine falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

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<sup>18</sup>Petition at 1.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 2.

<sup>21</sup>*Id.* at 4. WISN-TV states that WLS-TV achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

<sup>22</sup>*Id.* at Exhibit 1.

<sup>23</sup>*Id.* Nielsen defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See Nielsen at <http://www.nielsenmedia.com/glossary/>.

<sup>24</sup>*Id.*

<sup>25</sup>47 C.F.R. § 76.54(b).

TABLE 1 – WLS-TV VIEWING IN RACINE, WI

<u>Survey Year</u> <sup>26</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 2005/ Feb. 2006/ May 2006	15	1.281	1.011	10.25	8.2
Nov. 2006/ Feb. 2007/ May 2007	16	1.443	0.947	11.64	7.33

As a result, WISN-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in Racine, Wisconsin.

7. In opposition, WLS-TV argues initially that, based upon copyright claims filed by Time Warner, the community of Racine is served by a technically-integrated cable system that serves other additional communities.<sup>27</sup> While WISN-TV's request is currently directed solely at the community of Racine, WLS-TV states that it is concerned that grant of WISN-TV's waiver request might enable WISN-TV to extend its rights in communities outside of Racine.<sup>28</sup> With regard to the data submitted by WISN-TV, WLS-TV argues that WISN-TV has not provided viewing data for each individual sweep period provided, as required by Commission precedent, but instead relies on information regarding the average share of viewing hours and average net weekly circulation of WLS-TV for the combined measurement periods for each year.<sup>29</sup> WLS-TV points out that in instances where a petitioner seeking to obtain a waiver of the significantly viewed exception relies on data from more than two sweep periods, it must not only submit the average share of viewing hours and average net weekly circulation for each year, but also the separate sweep data for each individual sweep period for each year in order to "ensure that the reported audience results data are not skewed by the choice of sweeps periods."<sup>30</sup> Because the petition does not contain the data required to support a waiver of the significantly viewed exception, WLS-TV asserts that WISN-TV's request should be denied.<sup>31</sup>

8. Even if the Commission should find WISN-TV's data sufficient to evaluate the merits of its petition, however, WLS-TV maintains that more recent audience data than that provided by the petitioner demonstrates that WLS-TV is, in fact, significantly viewed in Racine.<sup>32</sup> WLS-TV states that it

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<sup>26</sup>All of the survey dates provided meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

<sup>27</sup>Opposition at 2 n.3 and Exhibit 1.

<sup>28</sup>*Id.* at n.3.

<sup>29</sup>*Id.* at 2-3.

<sup>30</sup>*Id.* at 3, citing *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18111-12 (2007); *Meredith Corporation*, 22 FCC Rcd 12932, 12934-35 (2007).

<sup>31</sup>*Id.* at 3.

<sup>32</sup>*Id.* at 4.

commissioned Nielsen to prepare a special tabulation of diaries obtained from over-the-air households located in the same zip codes as those used by WISN-TV for the most current sweep periods of February, May and November 2007.<sup>33</sup>

**TABLE 2 – WLS-TV VIEWING IN RACINE, WI  
(SUBMITTED BY WLS)<sup>34</sup>**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2007/ May 2007/ Nov. 2007	19	4.695	3.102	20.54	8.27

WLS-TV states that its Nielsen study demonstrates that WLS-TV's shares, with one standard error added, were 7.797 percent of total weekly viewing hours and 28.81 percent net weekly circulation.<sup>35</sup> WLS-TV argues that these values exceed the minimum 3 percent of total weekly viewing hours and 25 percent of net weekly circulation shares required for a network station, like WLS-TV, to be deemed significantly viewed.<sup>36</sup> WLS-TV asserts that in situations where the Commission is presented with data demonstrating that, based upon the most current Nielsen survey data available, a station is significantly viewed, it should reject a request for waiver of the significantly viewed exception regardless of the existence of other data purporting to demonstrate that the station failed to meet the required viewing levels for two, earlier years.<sup>37</sup> WLS-TV argues that rejection of a waiver request based on stale data is consistent with the Commission's rationale for adopting the significantly viewed exception to the exclusivity rules because the Commission established the exception to preserve the existing off-air viewing situation by treating a significantly viewed station as a local station rather than a distant station.<sup>38</sup> Moreover, WLS-TV states that, consistent with Section 76.54(b) of the Commission's rules, a station seeking significantly viewed status need only provide survey data for one year.<sup>39</sup> In this instance,

<sup>33</sup>*Id.* at Exhibit 3. WLS-TV states that, in order to provide data comparable to the Nielsen study submitted by WISN-TV, the instant Nielsen study considers the same three sweep periods as presented in the petition and presents the results in the same manner. WLS-TV notes that, while WISN-TV's data appears to have included zip code 53490, it was not included in WLS-TV's data because that zip code does not appear to be a valid U.S. zip code. *See id.* at Exhibit 4.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 5 and Exhibit 3.

<sup>36</sup>*Id.* at 5, citing 47 C.F.R. § 76.5(i).

<sup>37</sup>*Id.* at 5.

<sup>38</sup>*Id.* at 6, citing *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations With Respect to Network Program Exclusivity Protection by Cable Television Systems*, 52 FCC 2d 519, 535 (citing 38 FCC 2d 683, para. 97 (1965)) ("Our purpose was and is to preserve the existing off-the-air situation, insofar as exclusivity is concerned, and not to give stations any greater exclusivity vis-à-vis CATV systems than they now enjoy as against each other . . . our aim is to preserve for stations the competitive exclusivity they have been able to obtain as against station, but nothing more.").

<sup>39</sup>*Id.* at 7, citing 47 C.F.R. § 76.54(b).



where WLS-TV has long been deemed significantly viewed in Racine County, it should not be required to provide more data to defend its significantly viewed status in the community of Racine than it would be if it were seeking to be added to the significantly viewed list.<sup>40</sup>

9. With regard to WLS-TV's concerns regarding the effect a grant of the instant waiver might have on WLS-TV's carriage outside of the community of Racine, WISN-TV states in reply that Time Warner would only be obligated to block WLS-TV's duplicative programming in the community of Racine.<sup>41</sup> WISN-TV points out that it has no control over any broader deletion that might be required in order for Time Warner to comply with the Commission's decision in this instance.<sup>42</sup> With regard to survey data, WISN-TV argues that it provided WLS-TV notice of the study and data that would accompany its petition thirty days before the survey was commissioned from Nielsen and such notice clearly stated that WISN-TV would present "combined" data from three sweeps periods in each of the two years studied.<sup>43</sup> WISN-TV contends that, because WLS-TV did not object to the study within twenty days of receipt of the notice, as required by Section 76.54(c) of the Commission's rules, the Commission has the authority to deem WLS-TV's objection, raised herein for the first time, as waived since the purpose of the rule is to allow interested parties to resolve any concerns regarding survey methodology prior to the filing of a petition.<sup>44</sup> WISN-TV argues that, while it is true that the Commission has suggested that a petitioner who submits three sweeps periods should submit both the average or combined audience data for the year and separate sweeps data for each individual sweeps periods used, it is not aware of any petition for waiver that has been dismissed or denied for failure to do so.<sup>45</sup> Indeed, WISN-TV asserts that the Commission has previously granted petitions relying on data from three sweeps periods without requiring the petitioner to show separate sweeps data for each sweeps period.<sup>46</sup> Moreover, WISN-TV points out, even the Nielsen study that WLS-TV submitted is combined, not separate, sweeps data.<sup>47</sup> However, in order to satisfy WLS-TV's concerns, WISN-TV submits supplemental data from Nielsen which provides separate sweeps data for each individual sweeps period relied on in the original data submitted.<sup>48</sup>

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<sup>40</sup>*Id.* WLS-TV argues that, based upon this most recent data, even if WISN-TV's petition should be granted WLS-TV could immediately submit a request for it to be considered significantly viewed in the community of Racine, pursuant to Section 76.54(b) of the rules.

<sup>41</sup>Reply at 2 n.3, citing *Capitol Broadcasting Co., Inc.*, 22 FCC Rcd 2011, 2012 (2007).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 2, citing Petition at Attachment A to Exhibit 3; *see also* 47 C.F.R. § 76.545(c).

<sup>44</sup>*Id.* at 3, citing *Progress Energy Service Co., LLC*, 19 FCC Rcd 10289 (2004); *Payne of Virginia*, 66 FCC 2d 633 (1997); *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972); *Virginia Broadcasting Corp.*, Order on Reconsideration, 22 FCC Rcd 18109 (2007); *KOIN-TV, Inc.*, 93 FCC 2d 186 (1983).

<sup>45</sup>*Id.* at 3.

<sup>46</sup>*Id.* at 4, citing *Capitol Broadcasting Co., Inc.*, 22 FCC Rcd 2011 (2007) ("*Capitol I*"); *Capitol Broadcasting Co., Inc.*, 22 FCC Rcd 1418 (2007) ("*Capitol II*").

<sup>47</sup>*Id.*, citing Opposition at Exhibit 3.

<sup>48</sup>*Id.* at Exhibit 1. WISN-TV states that the methodology used in creating this study is identical to that used in the study previously provided, with the exception that the sweeps periods are separate, not averaged. *See id.* at Exhibit 2.

**TABLE 3 – WLS-TV VIEWING IN RACINE, WI  
(INDIVIDUAL SWEEP PERIOD RESULTS)<sup>49</sup>**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 2005	1	0.00	0.00	0.00	0.00
Feb. 2006	8	2.81	2.13	11.66	11.93
May 2006	6	0.50	0.56	12.43	14.02
Nov. 2006	4	3.21	2.01	33.33	0.00
Feb. 2007	5	1.46	1.37	25.00	0.00
May 2007	7	0.00	0.00	0.00	0.00

WISN-TV states that this data demonstrates that, except for November 2006, WLS-TV failed to reach the required minimum threshold of 3 percent total weekly viewing hours and 25 percent net weekly circulation.<sup>50</sup> WISN-TV argues that although there is some variation in the share and come results among the six periods, the data is not so varied as to compromise the finding in the combined results that WLS-TV is not significantly viewed in Racine.<sup>51</sup> WISN-TV notes that the Commission has routinely granted waivers supported by data viewing patterns that vary from one year to the next.<sup>52</sup> In any event, WISN-TV asserts that the combined results are dispositive.

10. WISN-TV argues that the survey data submitted by WLS-TV for February, May and November 2007 is drawn from non-consecutive sweeps periods in one year in contrast to the data WISN-TV relied on which was drawn from three consecutive sweeps periods over a two-year period.<sup>53</sup> WISN-TV maintains that survey data is more reliable and indicative of true viewing patterns when drawn from consecutive periods rather than scattered ones.<sup>54</sup> WISN-TV states that this is particularly true here because the data provided by WLS-TV appears to highly skewed, most likely as a result of cherry picking data for the maximum result.<sup>55</sup> WISN-TV asserts that, WLS-TV's study notwithstanding, the Commission has ample authority to grant the instant waiver. If thereafter WLS-TV seeks to obtain a ruling that it is significantly viewed in Racine, it should do so pursuant to the Commission's rules and precedent.<sup>56</sup>

11. Section 76.54(b) of the rules provides that stations seeking to establish significantly

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<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 5. WISN-TV states that the November 2006 data indicates that with the standard error added, WLS-TV achieves a 5.22 percent share of total viewing hours and a net weekly circulation share of 33.33 percent.

<sup>51</sup>*Id.* at 5-6.

<sup>52</sup>*Id.* at 6, citing *Capital I*, 22 FCC Rcd at 1414 ; *Capital II*, 22 FCC Rcd at 1422; *MMK License LLC*, 20 FCC Rcd 11704, 11705 (2005).

<sup>53</sup>*Id.* at 7.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 7-8.

<sup>56</sup>*Id.* at 8.



viewed status may provide survey data “of noncable television homes that cover at least two weekly periods separated by at least thirty (30) days, but no more than one of which shall be a week between the months of April and September.”<sup>57</sup> Since the Commission’s decision in *KCST-TV*, petitioners seeking waivers of the significantly viewed exception have substituted one Nielsen audience sweep period, consisting of data collected over a four-week period, for each week. This generally permitted petitioners to obtain a sufficient sample for such a showing. In *Radio Perry, Inc.*, we noted that providing average audience statistics based on 12 weeks, rather than two sweep periods or eight weeks, would add to the accuracy of the statistics.<sup>58</sup> In this instance, WISN-TV submitted three sweep periods in each year instead of the required two. In instances where petitioners submit more than two sweep periods, we require them to submit averages for each independent sweep period in addition to an overall average of all sweep periods for each year surveyed.<sup>59</sup> We require this because the extra sweep period may skew the survey results by raising the overall average when each sweep period considered alone would not meet the requirements of *KCST-TV*.<sup>60</sup> Initially, WISN-TV provided only the overall averages of all three sweep periods it submitted for each year surveyed. In its opposition, WLS-TV correctly pointed out that WISN-TV should have also included the averages for the individual sweep periods as well and in this we agree. Despite its continued contention that such individual averages were not required, however, WISN-TV ultimately submitted this data in its reply.

12. When the individual sweep data submitted by WISN-TV is considered along with the data submitted by WLS-TV, however, questions arise as to the reliability of the reported averages for the three combined sweep periods for each of the two years initially submitted by the petitioner. Indeed, the separate results show differences from sweep period to sweep period that lend credence the WLS-TV’s claim that it remains significantly viewed in the community of Racine. For example, in examining WISN-TV’s individual sweep period data that shows that WLS-TV attains no measurable audience in one of the three sweep periods, the results appear anomalous considering the data reported for the other sweep periods.<sup>61</sup> For instance, for November 2005, the result is based on only one in-tab household; an extremely unreliable statistic since it is based on the viewing of one household and not the average of a sample of households. In the second year, for May 2007, WLS-TV attains no measurable audience shares based on 7 in-tab households; a small sample but one that allows for the calculation of an average audience share and a standard error. These results lower the combined average that would have resulted if only the first two sweep periods for the second year (November 2005 and February 2007) had been included. The addition of a third sweep period with no reported viewing shares could skew the combined average results and, as a result, raises doubt as to whether WLS-TV remains significantly viewed in Racine. The November 2006 sweeps period demonstrates that WLS-TV attained a 3.21 percent share of total viewing hours and a net weekly circulation share of 33.33 percent. In February 2007, those same values are 1.46 percent and 25.00 percent, respectively. While Nielsen’s statistics cannot be replicated because they use sophisticated sampling and weighting techniques that improve the reliability of the estimated averages, we can make rough estimates of the averages. Combined, a simple arithmetic average of these figures results in a rough estimate of an average 1.835 percent share of total viewing hours and a net weekly circulation share of 29.165 percent.<sup>62</sup> While these rough estimates are

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<sup>57</sup>47 C.F.R. § 76.54(b).

<sup>58</sup>11 FCC Rcd 10564 (1996).

<sup>59</sup>See *WTNH Broadcasting*, 16 FCC Rcd at 6784.

<sup>60</sup>See *KCST-TV*, 103 FCC 2d 407 (1986).

<sup>61</sup>See Table 3 above.

<sup>62</sup>We note that these calculations are intended only to be illustrative of the questions raised by the submitted (continued...)

inconclusive regarding whether the third survey period with no reported viewing of WLS-TV lowers the combined average enough to demonstrate that WLS-TV is no longer significantly viewed in Racine, they do raise the issue of the accuracy of the reported combined audience statistics.

13. With regard to the data submitted by WLS-TV attempting to demonstrate that it remains significantly viewed in Racine, we agree that, to the extent that the Commission's rules require that a showing to establish significantly viewed status be based on two sweep periods and not data from two separate years, WLS-TV's submission approximates the required showing. However, because WLS-TV used more than two survey periods, it would need to provide the individual sweep periods. WISN-TV argues that WLS-TV's data is likely skewed by the inclusion of the November 2007 sweep period since the results seem inconsistent with the individual results WISN-TV provided in its reply for the other 2007 sweep periods.<sup>63</sup> Contrary to WISN-TV's contention, however, while it is impossible to calculate exactly what the November results are, they appear closer to the individual sweep results from the first two survey periods submitted by WISN-TV. For example, the combined net weekly circulation share reported by WLS-TV is 20.54 percent (or 28.81 percent with the standard error added). This value appears to be more consistent with the November 2006 and February 2007 individual audience sweep period statistics submitted by WISN-TV which demonstrates net weekly circulation shares of 33.33 percent and 25.00 percent, respectively.<sup>64</sup> It appears, therefore, that the difference between these values and the included, but not separately reported November 2007 data, likely comes from the selected sample and not from an outlier period or an attempt to skew the data. Again, this raises doubt regarding whether by the May 2007 period, which lowers the combined results in WISN-TV's showing, is representative of the actual viewing in Racine.

14. Finally, with regard to WLS-TV's argument that WISN-TV did not use the most recent data available at the time of its filing, we point out that we have never imposed a requirement that the submitted data include the latest available survey period, although we do expect petitioners to use

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data and the effect which no reported audience in the third survey period has on the combined audience shares. Alternatively, a combined average for the two periods could be estimated using an arithmetically weighted average using the number of in-tab households in each period. Doing so results in an average 2.238 percent share of total viewing hours and a net weekly circulation share of 28.702 percent. As in the simple average calculation, the net weekly circulation share exceeds the significant viewing criteria of 25 percent and a small standard error would make the share of total viewing hours exceed the criteria of 3 percent.

<sup>63</sup>WISN-TV noted that its individual sweep data demonstrated that WLS-TV achieved a 2.83 percent total weekly share and a net weekly circulation share of 25 percent in February 2007 with 5 in-tab households and no reported audience in May 2007 based on 7 in-tab households. With the addition of the November sweep period included in the WLS-TV data, WISN-TV contends that the combined result increases to a 7.797 percent average share and a combined net weekly circulation share of 28.81 percent, with the addition of standard errors.

<sup>64</sup>Comparing the combined share of total weekly viewing hours reported by WLS-TV with the individual sweeps data provided by WISN-TV shows slightly more difference, but not any conclusive evidence that WLS-TV's data skews the results since the November 2006 and February 2007 data audience are close to or within the expected interval when the standard error of the WLS-TV survey average is considered. Based on WLS-TV's data, we can estimate that its station's total share of viewing hours is actually between 1.593 percent and 7.797 percent had all households been used to determine the audience share. (In statistical terms, with 67 percent probability, we expect the actual value to lie in the range, or confidence interval, one standard error below to one standard error above the reported sample audience statistics. For 95 percent probability, the interval would be calculated using two standard errors.) WISN-TV's reported audience of 3.21 percent in November 2006 falls in this range, and the reported 1.46 percent share in February 2007 falls very close to it.

relatively recent data for these types of waivers. As WISN-TV asserted in its petition, it proposed to use the most recent data available at the time it started the process with its Section 76.54(c) notification to interested parties, with the exception of the July sweeps.<sup>65</sup> WISN-TV did not include the July sweep data because Section 76.54(b) limits the surveys to one between April and September and it proposed to use the May sweeps to have three consecutive survey periods.<sup>66</sup> Therefore, we find that the choice of survey periods is consistent both with what has been previously accepted and what is specified in the Commission's rules.

15. Based on the record in this proceeding, particularly the 2007 Nielsen data submitted by WISN-TV and the individual sweep period results supplied by WISN-TV in its Reply, we find that the submitted audience surveys do not conclusively demonstrate that WISN-TV is no longer significantly viewed in Racine, Wisconsin. As a result, WISN-TV's petition will be denied.

#### IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, that the petition filed by WISN Hearst-Argyle Television, Inc. **IS DENIED**.

17. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>67</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Senior Deputy Chief, Policy Division  
Media Bureau

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<sup>65</sup>See Petition at 2-3 and Attachment A to Exhibit 3.

<sup>66</sup>See 47 C.F.R. § 76.54(b).

<sup>67</sup>47 C.F.R. §0.283.